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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JANNISS VARNER,

Petitioner

-v.-

STATE OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

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QUESTIONS PRESENTED

Petitioner Janniss Varner was convicted at a jury trial of assault with intent to commit murder. An appeal of right to the Michigan Court of Appeals resulted in an opinion for affirmance, and the Michigan Supreme Court denied leave to appeal by a 5-2 vote. The questions presented are:

QUESTION 1: WHERE STATE LAW ALLOWS A PRIVILEGE FOR COMMUNICATIONS TO GOD MADE VIA A PRIEST OR MINISTER, WHETHER IT IS CONSTITUTIONAL FOR THE STATE TO DENY PRIVILEGE WHERE THE COMMUNICANT'S RELIGIOUS BELIEFS REQUIRE HER TO ADDRESS HER COMMUNICATIONS DIRECTLY TO GOD, RATHER THAN THROUGH AN INTERMEDIARY.

QUESTION 2: WHETHER THE FIRST AMENDMENT PROVIDES PETITIONER A PRIVILEGE PROTECTING THE PRIVACY OF HER WRITTEN PRAYERS TO GOD.

QUESTION 3: WHETHER A STATE COURT CAN MAKE A VALID RULING OF "INEVITABLE DISCOVERY" BASED LARGELY ON SPECULATION, AND WITHOUT ANY TESTIMONY FROM THE PURPORTED INEVITABLE DISCOVERER.

QUESTION 4: WHETHER INEVITABLE DISCOVERY WAS PROPERLY FOUND WHERE THE ITEM WAS WRITINGS IN A DIARY IN A CLOSET, THE

PURPORTED INEVITABLE DISCOVERER TOOK ONLY A FEW ITEMS FROM THE APARTMENT, AND THE APARTMENT MANAGER THREW OUT MOST OF THE CONTENTS OF THE APARTMENT.

QUESTION 5: WHETHER A TRIAL COURT RULING THAT PETITIONER HAD STANDING TO CONTEST THE SEARCH CAN BE OVERTURNED BY A REVIEWING COURT WHERE THE PROSECUTION DID NOT APPEAL.

QUESTION 6: WHETHER A DEFENDANT HAS STANDING TO CONTEST A SEARCH OF THE APARTMENT WHERE SHE WAS THE PARTY ON THE LEASE, KEPT PERSONAL ITEMS THERE SUCH AS THE DIARY AND HER BANK STATEMENTS, AND WHERE THE LANDLORD TESTIFIED THAT SHE WAS LEGALLY RESPONSIBLE FOR THE RENT.

QUESTION 7: WHETHER THE PETITIONER'S TEMPORARY MOVE TO HER MOTHER'S RESIDENCE AFTER AN INJURY DEPRIVES HER OF STANDING TO COMPLAIN OF A SEARCH OF HER OWN APARTMENT.

QUESTION 8: WHETHER, WHERE STATE LAW ALLOWS A DEFENSE OF SELF-DEFENSE OR PROVOCATION, THE STATE CAN PRECLUDE THOSE CLAIMS, AND BAR "BATTERED SPOUSE" TESTIMONY IN SUPPORT OF THOSE CLAIMS.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
INDEX OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
STATEMENT OF PROCEEDINGS	4
STATEMENT OF FACTS	4
REASONS FOR GRANTING THE WRIT	7
QUESTION I	7
QUESTION II	7
QUESTION III	15
QUESTION IV	16
QUESTION V	21
QUESTION VI	22
QUESTION VII	22
QUESTION VIII	25
CONCLUSION	30
APPENDIX	A1
Michigan Court of Appeals Opinion, 4/23/02	A1
Michigan Supreme Court Order, 4/8/03	A5

INDEX OF AUTHORITIES

Cases

Beaudrie v. Anchor Packing Co, 231 Mich. App. 242 (1998) 25
Bumper v. North Carolina, 391 U.S. 543 (1968) 22
Bush v. Oscoda Area Schools, 109 Mich. App. 373 (1981) 25
Cantwell v. Connecticut, 310 U.S. 296 (1940) 14
Crane v. Kentucky, 476 U.S. 683, 690 (1986) 29
Dykstra v. Director, Dept of Natural Resources, 198 Mich. App. 482 (1993) 25
Epperson v. Arkansas, 393 U.S. 97 (1968) 10
Everson v. Board of Education, 330 U.S. 1 (1947) 14
Gillette v. United States, 401 U.S. 437 (1971) 11
Glassbrook v Lansing Wheelbarrow Co., 177 Mich 29, 43 (1913) 27
IBEW Local #58 v. McNulty, 214 Mich. App. 437 (1995) 25
In re Grand Jury Investigation, 918 F.2d 374 (3d Cir 1990) 12
Kyllo v. United States, 533 U.S. 27 (2001) 23
Lamson v. Martin, 182 Mich. App. 233 (1990) 25
McMann v. Securities and Exchange Commission, 87 F.2d 377, 378 (2d Cir. 1937) 12
Minnesota v. Olson, 495 U.S. 91 (1990) 22
Mockaitis v. Harcleroad, 104 F.3d 1522 (9th Cir. 1997) 13
Morris v. Metriyakool, 418 Mich. 423 (1984) 25
Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958) 11
Nix v. Williams, 467 U.S. 431 (1984) 16
People v. Green, 113 Mich. App. 699 (1982) 27
People v. Heflin, 434 Mich. 482, 502 (1990) 26
People v. Hoskins, 403 Mich 95 (1978) 27
People v. Lennon, 71 Mich. 298 (1888) 29
People v. Lipps, 167 Mich. App. 99 (1988) 26

People v. Pouncey, 437 Mich. 382 (1991) 28, 29
People v. Prather, 121 Mich. App. 324 (1983) 30
People v. Shelton, 64 Mich. App. 154 (1975) 26, 29
Pierce v C.H. Bidwell Thresher Co., 158 Mich 356 (1909) 27
School District of Abington Township, Pennsylvania v. Schempp, 374 U. S. 203 (1963) 14
Shipman v. Fontaine Truck Equipment Co, 184 Mich. App. 706 (1990) 25
Stone v. Powell, 428 U.S. 465 (1976) 17
Therrian v. General Laboratories, Inc, 372 Mich. 487 (1964) 25
Totten v. United States, 92 U.S. 105 (1875) 11
Trammel v. United States, 445 U.S. 40 (1980) 12
United States v. Bass, 41 F. Appx. 735, 2002 WL 1378219 (6th Cir. June 24, 2002) [unpublished] 19
United States v. Wilson, 536 F.2d 883 (9th Cir. 1976) 23
Walter v. United States, 447 U.S. 649 (1980) 21
Ward v. Walsh, 1 F.3d 873 (9th Cir. 1993) 14
Welsh v. Wisconsin, 466 U.S. 740 (1984) 23

Constitutional Provisions

U.S. Const., Amend. I passim
U.S. Const., Amend. IV 3, 22, 23
U.S. Const., Amend. XIV 3, 24

Statutes

M.C.L. 600.2156 3, 12

Treatises

5 W.R. LaFave, Search and Seizure § 11.3(a), p. 125 (3d Ed. 1996) 23

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PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

JANNISS VARNER, Petitioner, by and through her attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review the ruling of the Michigan Court of Appeals of April 23, 2002, affirming her conviction and sentence.

OPINIONS BELOW

The Appendix includes the opinion of the Michigan Court of Appeals of April 23, 2002 and the order of the Michigan Supreme Court of April 8, 2003.

STATEMENT OF JURISDICTION.

This case began as a criminal prosecution in Wayne County, Michigan, Circuit Court. The original judgment was entered December 17, 1999. The opinion of the Michigan Court of Appeals was issued April 23, 2002. The Michigan Supreme Court denied leave to appeal on April 8, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

M.C.L. 600.2156 provides:

> "No minister of the gospel, or priest of any denomination whatsoever, or duly accredited

> Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination."

STATEMENT OF THE CASE

Statement of Proceedings

Petitioner Janniss Varner was convicted of assault with intent to murder in a jury trial in the Wayne County Circuit Court in the November 27, 1995 nonfatal shooting of Alvin Knight. (Mr. Knight was later killed on July 24, 1998, in an unrelated incident for which Petitioner has not been charged). A variety of pretrial matters were heard by the Hon. David P. Kerwin. Trial was held before the Hon. Ulysses W. Boykin. On December 17, 1999, Judge Boykin sentenced Petitioner to prison for 13 to 20 years.

Appeal of right was taken to the Michigan Court of Appeals which affirmed on April 23, 2002. The Michigan Supreme Court, by a 5-2 vote, denied leave to appeal on April 8, 2003.

Statement of Facts

Oscar Abney testified that he was the cousin of Alvin Knight, who lived in an apartment on Fenkell near Telegraph in Detroit. Petitioner Janniss Varner was Knight's girlfriend.

(T I, 70). On November 27, 1995, Mr. Knight came to his residence. (T I, 74). Mr. Knight complained he had been shot, and showed the wound. (T I, 76-77). He did not know the person who shot him. (T I, 77). Mr. Knight said it happened in the garage at Petitioner's mother's house. (T I, 77). Mr. Knight continued in his relationship with Petitioner Varner, who was present at the apartment when Mr. Abney would visit. (T I, 80-81).

Off. Michael Foley testified that on November 27, 1995, around 10 a.m. he went to a location on Robeson St. and met Oscar Abney and Alvin Knight. Knight had been shot in the shoulder. (T I, 117-120). Mr. Knight told him that an unknown assailant attacked him in his girlfriend's mother's garage. (T I, 131).

Off. Peter Howard testified that on November 27, 1995 he was sent to 1603 Balmoral, home of Petitioner's mother Nellie Varner. (T I, 151, 155). He found no evidence that the shooting took place there, such as casings, blood or bullet holes. (T I, 155). However, Off. William Niarhos found evidence of bullet strikes. (T II, 81).

Off. Karen Cooper testified that 3 years later, on July 24, 1998, at the apartment building at 23760 Fenkell, she heard shots then saw Alvin Knight on the ground. (T I, 160, 164). He died in her presence. (T I, 165).

Georgia Kade, apartment manager at Fenkell, testified that Janniss Varner and Alvin Knight were the tenants. (T II,

23).

Sgt. Catherine Adams testified that they entered the apartment, number 216, the day after the 1998 shooting. They came back a few days later looking for more evidence. Notebooks or journals were seized from the front closet of the apartment by Sgt. Ellis. (T II, 34-35).

Dr. Martin Harris testified that on November 27, 1995, he treated Alvin Knight for a gunshot wound to the shoulder and bruises to the head. (T II, 42, 44).

Barney Flowers testified that the relationship between Petitioner and Mr. Knight was rocky, and on and off. (T II, 63).

Sgt. Jo Ann Kinney read from Petitioner's notebooks. (T II, 125-135; T III, 4-76). Petitioner wrote "I don't regret what I did to him." She complains of physical abuse by Knight including raping and choking, and other activities of Mr. Knight. She discusses her love for the child Alvin Knight Jr. and the deficiencies of Mr. Knight as a father. She threatens that if Mr. Knight puts his hands on her again he is a dead MF. She states in the document that "I had him shot November 27, 1995 and he abused me November 25, 1995. He raped me and tied me up for three hours, put his hands around my neck." She states "Thank you God for answering my prayers and taking Alvin Knight to his grave."

The notebook entries were addressed to "Dear God" and contain criticism of organized religion. (T IV, 11-16).

As discussed below, a motion to suppress the writings of Petitioner Varner on grounds of illegal search and religious privilege was denied. The court made a ruling excluding testimony about Battered Woman Syndrome and would not allow instructions on manslaughter because of the claim that this was a hired shooting.

REASONS FOR GRANTING THE WRIT

QUESTION 1: WHERE STATE LAW ALLOWS A PRIVILEGE FOR COMMUNICATIONS TO GOD MADE VIA A PRIEST OR MINISTER, WHETHER IT IS CONSTITUTIONAL FOR THE STATE TO DENY PRIVILEGE WHERE THE COMMUNICANT'S RELIGIOUS BELIEFS REQUIRE HER TO ADDRESS HER COMMUNICATIONS DIRECTLY TO GOD, RATHER THAN THROUGH AN INTERMEDIARY.

QUESTION 2: WHETHER THE FIRST AMENDMENT PROVIDES PETITIONER A PRIVILEGE PROTECTING THE PRIVACY OF HER WRITTEN PRAYERS TO GOD.

Certiorari should be granted because the United States Supreme Court is uniquely well suited to determine exactly how much discrimination on the basis of religious belief is permitted in the state courts. Janniss Varner's written prayers and supplications to God, written and kept in her own apartment, were seized and used in evidence against her,

despite the timely and specific claim of First Amendment religious privilege.

Under the ruling in this case, certain religious beliefs and practices are discriminated against. If a person believes that one communicates with God through a priest or minister, the communications are privileged. If a person believes that she should communicate directly with God, the communications (at least in this case) are held not to be privileged. This Court should grant certiorari to determine whether it is constitutional for a state to discriminate among religious beliefs in this fashion.

Prior to trial Petitioner moved to suppress the writings as privileged religious communications. This was denied based on the record at the preliminary examination. (T 1/29/99, 7). The Court of Appeals simply ruled in a footnote that they "reject" the claim. We submit the issue is considerably more complex and meritorious than the Court of Appeals cavalier treatment would suggest. (Apx. A4).

In each case the entries, which were made on a virtually daily basis, begin with the salutation "Dear God." (PET, 73-76). Ms. Varner details in these letters to the Creator her disillusionment with organized religion, and the clergy. (PET, 75, 77-78).[1] Some of the letters specifically take the form of

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1 The entries referred to include:

conventional prayers,[2] and some are more informal, almost conversational in tone, beginning, for example, "Dear God, it's me, Janniss," or ending, "well, God, I will talk to you tomorrow." (PET, 79). The writings make clear that the defendant gained solace and consolation from their writing, and they gave her what she considered to be a private and secret outlet for her innermost thoughts and feelings.[3] (PET,

---

> "I don't trust religion. I realize most organizations are just . . . plain money cults;"
>
> "Church was haven for a good life and possibly a marriage to someone good. I only found that church was hell. I learned that church practiced witchcraft . . . and to top it all off, the preacher and his wife were some of the main ringleaders;"
>
> "I would love to be at a church and go on a regular basis but I find the place offers -- it is such a money thing that the fucking pimps, if you excuse the expression, are out of business because of it."

2 "Lord, give me guidance and insight concerning what I need to do, make things clear and plain to me. Give me the things I need to have and show me the knowledge I need."

3 Passages such as the following make this clear:

> "Since writing these past two pages, I feel so much better."

79-80).

The writings contain statements that can reasonably be said to incriminate her in this case, and which are in fact the only evidence in the case directly linking her to the crime. If Janniss Varner had made these confessions and entreaties to a member of the clergy - whether orally or in writing - it could hardly be argued that they would not be privileged. The fact that her perceptions of ministers and church life moved her to bypass the clergy and make her confessional appeals directly to God does not change the essential character of the communications, and cannot strip them of their privileged character.

It would constitute unlawful favoring of one religion over another, and an establishment of religion, to provide that the privilege that protects communications to God depends on whether your religious beliefs require the intermediation of a priest, or allow you to communicate directly with God. See *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968):

> Dear God, I'm writing this. I don't know. Life is so confusing for me right now. I know I have approached the situation before only to come back void. . . . I can't talk to anyone but you because I have tried to trust people, male and female. They have turned on me."

"Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice."

Under the First Amendment, the Courts must insure "governmental neutrality in matters of religion." *Gillette v. United States*, 401 U.S. 437 (1971). "The Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact." Gillette, supra.

In *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1958), the Court held that the question of privilege depended on whether it was "a confidential confession to a spiritual adviser." No one could reasonably dispute the legitimacy of a religious claim that God is the ultimate spiritual adviser. No one could reasonably dispute that that is how Janniss Varner viewed it, judging by what she actually wrote.

There exists a long line of influential American decisions which recognize the existence of the privilege as basic to our system of jurisprudence, even in the absence of specific statutory enactments. Thus, for example, in *Totten v. United States*, 92 U.S. 105, 107 (1875), Mr. Justice Field wrote:

> "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and

> respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose."

See also, McMann v. Securities and Exchange Commission, 87 F.2d 377, 378 (2d Cir. 1937) (Hand, J., listing penitential privilege among those traditionally recognized). Indeed, as the Third Circuit declared in *In re Grand Jury Investigation*, 918 F.2d 374, 381 (3d Cir 1990), the privilege is "'indelibly ensconced' in the American common law." The Court in *Trammel v. United States*, 445 U.S. 40 (1980) said "The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." That is really no different than what Ms. Varner did in making her writings. The only difference is one that is not constitutionally permissible to discriminate on, that is, that her spiritual counselor is heavenly rather than human.

Michigan recognizes one kind of penitential privilege by statute. M.C.L. 600.2156 provides:

> "No minister of the gospel, or priest of any denomination whatsoever, or duly accredited

> Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination."

This case presents the question in stark terms. If the writings of Ms. Varner were to an intermediary to God (priest, minister, bishop, pope) they would clearly be covered under the privilege. To deny the same privilege to her because her beliefs tell her to communicate directly to God instead of through an intermediary is a discrimination between religious beliefs and a violation of the First Amendment, U.S. Const., Amend. I. We submit it is unconstitutional for a state to employ a regime where a statement to a priest is protected but a statement directly to God is not.

Statutory penitential privileges such as Michigan's are generally aimed at preventing the disclosure of confessions by clergymen to such confessions are made. Nonetheless, it is clear that, if confessions made to a member of the clergy are privileged, the nonconsensual interception of those confessions does not deprive them of their privileged character. *E.g., Mockaitis v. Harcleroad*, 104 F.3d 1522, 1531-1533 (9th Cir. 1997) [Taping conversations between criminal defendant and priest in county jail; statements of the defendant must be suppressed]. See also *Franklin v.*

Oregon, 662 F.2d 1337 (9th Cir. 1981) [private prayers by prisoner are privileged].

"The ideal of our people as to religious freedom," as incorporated in the First Amendment, is one of "absolute equality before the law, of all religious opinions and sects;" as to religious observance and belief, "[t]he government is neutral, and, while protecting all, it prefers none, and it disparages none." *School District of Abington Township, Pennsylvania v. Schempp*, 374 U. S. 203, 215 (1963).

Specifically, the Establishment Clause requires that one form of religious practice not be preferred over another, as the Supreme Court explained in *Everson v. Board of Education*, 330 U.S. 1 (1947).

At the same time, the coordinate protection of the Free Exercise clause means that the state cannot unduly burden a citizen's chosen mode of religious expression or practice. *E.g., Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940) ["Thus the Amendment embraces two concepts, - freedom to believe and freedom to act."]; *Ward v. Walsh,* 1 F.3d 873, 876 (9th Cir. 1993).

It would clearly offend these precepts to apply the protections of the Michigan statute, and accord the benefits of the Michigan law of privilege to those who accept the orthodoxies of organized Christian sects, while denying those protections and benefits to Janniss Varner, on the basis that her religious opinions and beliefs moved her to avoid clergy

and the physical establishments of the Christian church, while practicing the Christian faith, and addressing the Christian God in her own way. It offends principles of religious non-discrimination to say that if she had written "Dear Reverend Jones" the writings would be privileged, but because she wrote "Dear God," they are not.

Imagine the following: a notorious gangster is also known to be a dedicated church-goer. In addition to attending Sunday services, it is known that every Thursday he goes to a particular, and secluded, pew tucked away in a private nook of a particular church, and, in hushed tones, makes confession before God of his sins of the week, so that he might know "redemption and deliverance." Would anyone seriously argue that the government could properly plant a listening device, intercept those entreaties to God, and use them as evidence against him?

Janniss Varner chose to exercise her religious faith, not in some church pew, but in the privacy of her home, in written entreaties to the same God. If the First Amendment means anything, it means that her private prayers are no more admissible than those of the hypothetical hoodlum's. The rulings of the lower courts to the contrary must be reversed.

QUESTION 3: WHETHER A STATE COURT CAN MAKE A VALID RULING OF "INEVITABLE

DISCOVERY" BASED LARGELY ON SPECULATION, AND WITHOUT ANY TESTIMONY FROM THE PURPORTED INEVITABLE DISCOVERER.

QUESTION 4: WHETHER INEVITABLE DISCOVERY WAS PROPERLY FOUND WHERE THE ITEM WAS WRITINGS IN A DIARY IN A CLOSET, THE PURPORTED INEVITABLE DISCOVERER TOOK ONLY A FEW ITEMS FROM THE APARTMENT, AND THE APARTMENT MANAGER THREW OUT MOST OF THE CONTENTS OF THE APARTMENT.

"Inevitable discovery" is a long-recognized doctrine that can validate an otherwise illegal search. *Nix v. Williams,* 467 U.S. 431 (1984). Petitioner does not seek to eliminate that doctrine, but merely to limit it to cases where the inevitability of the discovery is established by evidence. Proof of inevitable discovery "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment . . ." *Nix*, 467 U.S. at 444 n. 5.

This case should be accepted and a ruling issued on the merits to determine the question of how much speculation can a trial court employ in order to come up with an "inevitable discovery" finding, where testimony about that point was largely absent. In other cases, testimony from the "inevitable discoverer" was required. Here the ruling was based essentially on guesswork.

As the issue deals with the Fourth Amendment, only the United States Supreme Court can provide any guidance to the state courts. Because of *Stone v. Powell*, 428 U.S. 465 (1976), which eliminates Habeas Corpus review of Fourth Amendment issues, pronouncements of the federal courts lower than the Supreme Court on such questions are ignored by the state courts.

Petitioner was convicted of assault with intent to commit murder of Alvin Knight, her boyfriend, that occurred November 27, 1995. Mr. Knight was later killed on July 24, 1998, in an unrelated incident for which Petitioner has not been charged.

The search was conducted by police at 23760 Fenkell Apartment 216A on July 30, 1998. (EHT 3/18/99, 10). The prosecutor conceded that the search was warrantless. (EHT 2/12/99, 5). Writings by Petitioner were seized. The items seized in the July 29 search were the basis of a search warrant for her mother's house at 1603 Balmoral. where more writings of Petitioner were seized. (EHT 2/12/99, 5-7).

Judge Kerwin ruled that Petitioner Varner did have standing to complain of the search, but found that it was inevitable that attorney Gerald Cavellier or Laverne Coleman, sister of Mr. Knight, would have found the writings, would have read them, and would have turned them over to the police, if the police had not searched the apartment and seized the writings themselves. (EHT 4/28/99, 6, 17-19).

We submit this ruling was clearly erroneous and improperly based on speculation.

Gerald Cavellier was an attorney for Alvin Knight. (EHT 3/9/99, 6-7). On August 31, 1998 (over a month after the police search and seizure) he and Laverne Coleman, sister of Mr. Knight, went to the apartment on Fenkell. He went with her because she was uncomfortable going alone. Ms. Coleman went there "As personal representative of the Estate to clear out the personal belongings of Alvin Knight, her brother." (EHT 3/9/99, 17-18). Attorney Cavellier did not participate in the packing of property or prepare an inventory. (EHT 3/9/99, 24).

Since attorney Cavellier did not do any searching or seizing, he could not have discovered anything.

Georgia Gail Kade, manager of the apartment building, testified that the sisters of Mr. Knight went in the apartment probably in September to get Mr. Knight's property. (EHT 3/9/99, 69). She went on to testify that they took a tv set and some furniture, and "left most of the stuff there for us to clean out and dispose of." Except for children's clothes taken to a shelter, all items were placed in the dumpster. (EHT 3/9/99, 70).

Obviously, it was not inevitable that building management would have found and read the writings and turned them over to police. The prosecutor's case must rest entirely on the inevitability of discovery, reading, and

turnover to police by Laverne Coleman.

However, Laverne Coleman did not testify. There is thus no evidence from her as to the intent and scope of her search. We do not have any testimony from her that she spent hours carefully examining each item in the apartment. We do not have any testimony from her that she did not simply pick out a few items of apparent value and leave the rest unexamined. Indeed, there is not even testimony that she can read.

The only evidence we have on the scope of Ms. Coleman's activities is the testimony of the apartment manager that Ms. Coleman took out only furniture and a television and left most things behind, and the apartment manager threw out the rest. See *United States v. Bass*, 41 F. Appx. 735, 2002 WL 1378219 (6th Cir. June 24, 2002) [unpublished] holding that since the policy of the hotel was to throw out abandoned property, it was not inevitable that they would have discovered property in the hotel room. The Court in *United States v. Bass* held:

> "In speculating on the inevitability of legal discovery of the evidence, this Court's speculation is constrained by the "demonstrated historical facts capable of ready verification or impeachment." *Nix*, 467 U.S. at 444-45 n. 5. The facts in the present case do not show how the duffel bag would have landed in police custody

> without the illegal police search of Bass's hotel room. The hotel policy regarding abandoned items belies the government's theory of inevitable discovery. Pursuant to this policy, the hotel, if unable to contact Bass at his contact address, [FN10] would have held the duffel bag for ninety (90) days, after which it would have been discarded. But for the warrantless search of Bass's room, [FN11] the bag would have been either claimed (presumably by Williams when he was released on bond that same day) or discarded after ninety days. Under no circumstances pursuant to formal hotel policy would the bag have been impounded by the police had the unlawful search not occurred. [FN12] Therefore, the Court cannot find that the government has met its burden in establishing that the unconstitutionally seized duffel bag "would have been discovered by lawful means." *Id.* at 444."

The finding that "The apartment was cleaned out by Knight's attorney and Knight's sister" was clearly erroneous and unreasonable where Knight's attorney searched nothing and cleaned out nothing, and Knight's sister removed only a few items, consisting of a tv and some furniture. The apartment was cleaned out by the building management, who presumably would have no interest in picking out the diary from the rest of the trash and reading Janniss Varner's written prayers to God. However, presumption was not needed, as

the manager testified that they picked out children's clothes for the shelter, and threw the rest in the dumpster.

If the police wished to conduct a more thorough review of the contents of the writings than would be accomplished in the future by the (hypothetical) review of Ms. Coleman, a warrant would be required. *Walter v. United States,* 447 U.S. 649, 662 (1980). (Warrant required to view obscene films in box turned over to authorities by private carrier on account of suggestive drawings and explicit descriptions on film containers).

Where there is no testimony from the purported inevitable discoverer that she was looking for written material, and would have read that written material, to say that she would have done so is unwarranted speculation. The other purported inevitable discoverer, the attorney, searched nothing. The apartment management threw everything left behind in the trash. The finding of inevitable discovery was unconstitutional because based on speculation contrary to *Nix v. Williams*, and because of the total lack of evidence to support inevitable discovery.

QUESTION 5: WHETHER A TRIAL COURT RULING THAT PETITIONER HAD STANDING TO CONTEST THE SEARCH CAN BE OVERTURNED BY A REVIEWING COURT WHERE THE PROSECUTION DID NOT APPEAL.

QUESTION 6: WHETHER A DEFENDANT HAS STANDING TO CONTEST A SEARCH OF THE APARTMENT WHERE SHE WAS THE PARTY ON THE LEASE, KEPT PERSONAL ITEMS THERE SUCH AS THE DIARY AND HER BANK STATEMENTS, AND WHERE THE LANDLORD TESTIFIED THAT SHE WAS LEGALLY RESPONSIBLE FOR THE RENT.

QUESTION 7: WHETHER THE PETITIONER'S TEMPORARY MOVE TO HER MOTHER'S RESIDENCE AFTER AN INJURY DEPRIVES HER OF STANDING TO COMPLAIN OF A SEARCH OF HER OWN APARTMENT.

Certiorari should be granted to determine the question of standing, for a person who paid the rent, phone, utilities, and kept personal items and private writings on the premises. A temporary stay at the Petitioner's mother's house for part of the month does not destroy standing, and this court should so rule. Otherwise, every time a person takes a vacation, or visits a relative, that person's residence is fair game for a warrantless police search.

A person may have more than one place of residence for Fourth Amendment purposes, and may have reasonable expectations of privacy in more than one residential location. *Minnesota v. Olson*, 495 U.S. 91 (1990); *Bumper v. North Carolina*, 391 U.S. 543 (1968); *United States v. Wilson*, 536

F.2d 883, 885 (9th Cir. 1976). "It cannot be said that 'one is protected by the Fourth Amendment at only his principal home.'" 5 W.R. LaFave, Search and Seizure § 11.3(a), p. 125 (3d Ed. 1996).

"With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27 (2001). Since "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed[,]' . . . [i]t is . . . 'a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable.'" *Welsh v. Wisconsin*, 466 U.S. 740, 748-49 (1984).

The lease for the apartment was in the name of Janniss Varner and Alvin Knight. The lease expired March 31, 1996, but had a provision to continue the tenancy on a month to month basis thereafter. (EHT 2/12/99, 9). According to the landlord, Petitioner Varner was responsible for the rent. (EHT 3/9/99, 89-92). Although Petitioner did use the Balmoral address (her mother's address) for certain mail (EHT 3/30/99, 18-20), much of that mail and other documents of the Petitioner and clothing were in the Fenkell apartment that was searched. (EHT 3/30/99, 25, 30).

Among documents found by police at the apartment were Petitioner's credit union and bank statements from 1998, documents belonging to Petitioner's mother, the

papers regarding her own adoption by her mother, her Rolodex, and a letter sent to Petitioner at Balmoral postmarked July 10, 1998. (EHT 2/12/99, 21, 23, 26-31, 34, 39-41). The search was July 30, 1998.

In June 1998 Petitioner was hit by a baseball and sought care from her mother. She therefore stayed at the apartment only 5 days in July 1998. She continued to pay the rent, phone and electric bills. She expected her personal property to remain there, and remain private. (EHT 3/30/99, 25, 28, 31-35).

As Judge Kerwin also noted: "it's important to note that the bank statements that she kept there and all of the important papers while containing an address on Balmoral were kept there by her along with personal diaries, phone books and the journals that are the primary item of interest in this lawsuit. . . . And, indeed the most recent bank statement went through the month of June and obviously was brought there." (EHT 4/29/99, 11, 13). He found she had standing.

Clearly, Petitioner had a reasonable expectation of privacy in a residential apartment where she paid the rent and utilities, and where she kept private possessions.

When Petitioner took the matter up on appeal, she and her attorneys had no reason to believe that the matter of standing could be relitigated. Petitioner submits that due process of law under the Fourteenth Amendment requires that a party (here, the prosecutor) seeking to overturn a

judicial ruling (such as the instant trial court ruling on standing) appeal that ruling, so that the affected party has cause to address the "appeal" with her pleadings.

Due process requires this result, especially where state law holds that where a ruling is not appealed by the aggrieved party, the appellate court lacks the power to overturn that ruling, *Morris v. Metriyakool*, 418 Mich. 423, 474 (1984); *Therrian v. General Laboratories, Inc*, 372 Mich. 487, 490 (1964); *IBEW Local #58 v. McNulty*, 214 Mich. App. 437 (1995) ; *Beaudrie v. Anchor Packing Co*, 231 Mich. App. 242, fn 3 (1998); *Dykstra v. Director, Dept of Natural Resources*, 198 Mich. App. 482, 492 (1993); *Shipman v. Fontaine Truck Equipment Co*, 184 Mich. App. 706, 714 (1990); *Lamson v. Martin*, 182 Mich. App. 233, 237 (1990); *Bush v. Oscoda Area Schools*, 109 Mich. App. 373, 383 (1981).

It denies due process of law for a state to routinely rule that unappealed matters are not subject to reversal on appeal, and then abandon that routine procedure after sandbagging the Petitioner.

QUESTION 8:- WHETHER, WHERE STATE LAW ALLOWS A DEFENSE OF SELF-DEFENSE OR PROVOCATION, THE STATE CAN PRECLUDE THOSE CLAIMS, AND BAR "BATTERED SPOUSE" TESTIMONY IN SUPPORT OF THOSE CLAIMS.

Prior to trial, counsel informed the trial court and the prosecution that they intended to defend the case on a theory of self-defense and/or provocation, supported and explained by reference to what is known as the "battered woman syndrome," or "battered spouse syndrome," and to offer expert testimony regarding the nature and effect of that syndrome. The judge denied this on the ground that he believed it was a hired or "contract" shooting. (T I, 4-17). We submit this was error, because under Michigan law, where the charge is assault with intent to murder, it must be shown that if the victim had died, the defendant would be guilty of murder, *People v. Lipps,* 167 Mich. App. 99, 106 (1988), therefore, the mental state of the defendant is of critical legal significance.

"In Michigan, the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v. Heflin*, 434 Mich. 482, 502 (1990). As this Court explained in *People v. Shelton*, 64 Mich. App. 154, 156-157 (1975), a case relied on by the Supreme Court in *People v. Heflin, supra,* for its authoritative formulation of the principles of self-defense, the matter is to be judged *from the point of view of the defendant*, using the "honest belief" standard.

The nature of the threat to the defendant - as well as the

necessity of the response - is to be judged by a subjective standard, from matters as they appeared to the defendant, as this Court noted in *People v. Green,* 113 Mich. App. 699, 704 (1982), another case cited by the *Heflin* Court.

The subjective nature of the standards under which Michigan law judges the matters of "imminent danger" and "necessity" renders those questions uniquely matters of fact.[4] Questions of fact, of course, are for the jury to decide, and not lightly to be taken from the jury's consideration. Rather, if there is *any* evidence from which a juror may conclude that the defendant was acting in self-defense (under the prevailing subjective standards), a self-defense instruction must be given, and "the sufficiency of this evidence . . . for the jury to determine." *E.g., People v. Hoskins,* 403 Mich. 95, 97 (1978).

She proposed to offer testimony from Dr. Lenore Walker, the psychologist who first identified the "battered

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4 Even outside of the sphere of self-defense, Michigan law consistently has always treated issues regarding whether danger is "imminent" as questions of fact, for a jury's determination. See., e.g., *Glassbrook v Lansing Wheelbarrow Co.*, 177 Mich 29, 43 (1913) (whether the danger is so imminent no prudent person would undertake to perform the service); *Pierce v C.H. Bidwell Thresher Co.*, 158 Mich 356, 359 (1909) (whether structure was imminently dangerous).

woman syndrome," in order to help the jury to understand why, in the context of such a relationship, the defendant "honestly and reasonably" believed that the threat to her safety was imminent, and that she "honestly and reasonably" believed that it was necessary to strike back against Alvin Knight *in precisely the way that the prosecutor claimed she did* - with fatal force, and through the agency of a third party.

Although the facts of this case are different from those of the most typical self-defense cases, she proposed to prove that she honestly believed, on November 27, 1995, that she faced imminent danger of death or serious injury at the hands of Alvin Knight, honestly believed that she was unable to defend herself directly, and that she honestly believed that the *only* way she could defend herself was through the aid of a third person.

Objectively, it may be hard for some to understand how a person can feel this way, or how such beliefs may be reasonable, but the expert testimony regarding the operation and effect of battered woman syndrome was offered to make clear that, from Janniss Varner's perspective as a battered woman, these beliefs were in fact reasonable, and well within the recognized ambit of the range of observed conduct of battered women.

In *People v. Pouncey*, 437 Mich. 382 (1991), the Court made clear that the element of provocation provides the difference between murder and manslaughter.

If the jury believed that she had, indeed, been bound and raped by Alvin Knight - and there was no evidence to the contrary - there is no question that this would be a sufficient provocation to induce a homicidal rage under the objective standard enunciated by the Court in *People v. Pouncey*, in that it surely "would cause the reasonable person to lose control."

On the question of whether Janniss Varner was still acting under the effect of the provocation (whether her blood had cooled) at the time of the acts upon which the instant charge was based (or of the assault), the question was clearly one for the jury to decide.

The net effect of the trial court rulings was to deny the defendant- appellant a most basic Constitutional right: the right to present a defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The proposed expert testimony regarding Battered Spouse Syndrome was integral to the defendant's defense, since it is only through an understanding of that condition that the jury would be adequately prepared to understand and evaluate the reasonableness and honesty of defendant's belief that the danger to her was imminent, "and that it was necessary to do what [she] did in order to save [herself] from such apparent threatened danger." *People v. Shelton, supra,* at 157 (quoting *People v. Lennon*, 71 Mich. 298, 301 (1888).

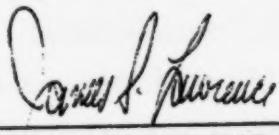
Given the great emphasis which Michigan law places

upon the defendant's own state of mind, it is hardly surprising that it is ordinarily held by the courts of this State that "[w]hether or not the accused acted in self-defense is a question of fact for the jury to determine." *People v. Prather,* 121 Mich. App. 324, 330 (1983). The trial court's rulings foreclosing the presentation of that defense in the case at bar, refusing to instruct the jury on it, and excluding the expert testimony which was essential to the jury's understanding of it, are simply inconsistent with the governing Michigan law, and so denied Petitioner her Constitutionally assured right to present a defense.

CONCLUSION

Petitioner Janniss Varner respectfully submits that for the reasons stated above, this Court should grant Certiorari, and upon consideration reverse the judgment of the Michigan courts.

Respectfully submitted,



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Dated: June 9, 2003

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,	UNPUBLISHED April 23, 2002
Plaintiff-Appellee, v JANNISS L. VARNER, Defendant-Appellant.	No. 224865 Wayne Circuit Court Criminal Division LC No. 98-011265

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from a jury trial conviction of assault with intent to commit murder, MCL 750.83, for arranging the shooting of her boyfriend, Alvin Knight. The trial court sentenced defendant to a term of thirteen to twenty years' imprisonment. We affirm.

Although Alvin Knight survived the charged shooting, he was subsequently shot to death in the parking lot of his apartment building. The police discovered defendant's responsibility for this crime through her journals, which the police seized from a closet shelf in Knight's apartment when the police searched the apartment, without a warrant, following Knight's death. Defendant argues on appeal that

the trial court erred in denying her motion to suppress this evidence. Although defendant, at one time, lived with Knight, the evidence showed that she had moved to her adopted mother's house and had not lived at the apartment for at least three weeks before the killing. Defendant has the burden of proving that she had an expectation of privacy in the object of the search and seizure and that her expectation is one that society recognizes as reasonable. *People v Powell*, 235 Mich App 557, 560; 599 NW2d 499 (1999). Defendant no longer had valid keys to the apartment and none of her clothing or personal belongings were at the apartment with the exception of the disputed documents and journals. She had not lived in the apartment for several weeks prior to Knight's death, and she never returned to the apartment after he was killed. Therefore, the trial court properly denied defendant's motion to suppress.

We also agree with the trial court that, in light of all relevant facts, the journals would have inevitably been discovered. The inevitable discovery exception permits admission of tainted evidence when the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been revealed in the absence of police misconduct. *People v Stevens, (After Remand)*, 460 Mich 626, 637; 597 NW2d 53 (1999). Here, prior to his murder, Knight told his attorney, who went with Knight's family to clean out the apartment, that he was afraid for his life and afraid of the Varners, Knight told his attorney

that, if anything happened to him, he wanted his sister to have custody of his son. Defendant acknowledged that she never returned to the apartment to retrieve any belongings. The apartment was cleaned out by Knight's attorney and Knight's sister. As the trial court noted, had the police not searched Knight's apartment immediately after his murder, defendant's journals "absolutely without question" would have been discovered and turned over to the police.1

Accordingly, for the reasons stated, the trial court did not err in denying defendant's motion to suppress defendant's journals.

Defendant also argues that the trial court erred in denying her motion to present expert testimony on battered woman syndrome, and in refusing to instruct on self-defense and mitigating circumstances. Expert testimony regarding the battered woman syndrome is admissible only when it is relevant and helpful to the jury in evaluating a complainant's credibility and the expert witness is properly qualified. *People v Christel*, 449 Mich 578, 579-580; 537 NW2d 194 (1995). Self-defense in Michigan requires a finding that the defendant's actions were justified because she honestly and reasonably believed that her life was in imminent danger or that there is a threat of serious bodily harm. *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990). A person may use deadly force in self-defense to repel a criminal sexual assault when confronted with force that the person reasonably believes could result in imminent death or serious

bodily harm, but self-defense is not available to repel a potential force. Id. We agree that the rationale behind self-defense or mitigating circumstances does not apply to a gun-for-hire situation such as occurred here. The trial court did not err in finding that a self-defense instruction was not available in a hired-gun situation, even if defendant presented credible evidence that she was a victim of the battered woman syndrome. See *People v Yaklich*, 833 P2d 758 (Col App, 1992).

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Henry William Saad

[1] We also reject defendant's suggestion that the body of law regarding prayer and penitential privilege, or the statutes regarding privileged communications with clergy, MCL 600.2156 and MCL 767.5a, apply to private writings.

Order
Entered: April 8, 2003

Michigan Supreme Court
Lansing. Michigan

121786

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellee,

v

JANNISS VARNER,

Defendant-Appellant.

Maura D. Corrigan
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman
Justices

SC: 121786
COA: 224865
Wayne CC: 98-011265

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On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh and Kelly, JJ., would grant leave to appeal.

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

April 8, 2003 /s/ Corbin R. Davis
Clerk